IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1541

ARTHUR GARRETT, ANGELO MORINI,
FIESTA FOODS, INC.,
Petitioners
v.
UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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CITATIONS TO OPINIONS BELOW

Direct appeal was taken to the United States Court of Appeals and therefore, there was no opinion in the District Court. The Opinion of the Court of Appeals is not yet reported but a copy of the slip Opinion is reproduced in Appendix A hereto, infra.

JURISDICTION

The judgment of the Court of Appeals was entered on March 28, 1978. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

IS IT NOT REVERSIBLE ERROR FOR THE DISTRICT COURT IN A CRIMINAL CASE TO INSTRUCT THE JURY IN SUCH FASHION AS TO SHIFT THE BURDEN OF PROOF ON THE CRITICAL ELEMENT OF INTENT FROM THE PROSECUTION TO THE DEFENDANTS.

STATUTES INVOLVED

The statutory provisions involved are set forth in Appendix B., infra.

STATEMENT OF THE CASE

In light of the fact that this petition is directed solely to a question of law, the facts of the case will be reviewed only briefly.

Petitioners were tried jointly on indictments charging twenty counts of mail fraud and one count of conspiracy. The defendants were Arthur Garrett, food service director at Slippery Rock State College; Fiesta Foods, Inc., a food supply company; and Angelo Morini, the president of Fiesta Foods. They were charged with using the mails in connection with a scheme to falsify bids to the college in order to ensure that Fiesta would be awarded supply contracts for part of Slippery Rock's food service. The government's evidence as to the use of the mails was not disputed. The jury found each defendant guilty of eight counts of mail fraud. The individual defendants were sentenced to prison.

Timely direct appeal was taken from the judgment of sentence and conviction and the Third Circuit Court of Appeals affirmed the conviction on March 28, 1978.

REASONS FOR GRANTING THE WRIT

Petitioners contend that a portion of the court's instructions to the jury impermissably shifted the burden of proof on intent from the government to the defendants. We further contend that this instruction and consequent burden shifting constituted reversible error.

The portion of the charge to which petitioners took specific exception at the trial and to which they took appellate exception was:

> "As a general rule it is resonable to infer that a person intends all the natural and probable consequences of an act knowingly done or knowingly omitted. So unless the evidence of a case leads you to a contrary conclusion you may draw the inference and find that the accused intended all the natural and probable consequences which one standing in like circumstances and possessing like knowledge should reasonably have been expected to result from an act knowingly done or knowingly omitted by the accused."

This instruction is popularly known as the "Mann" instruction and derives its appellation from the fact that its use was condemned and found to be plain error in the case of *Mann v. United States,* 319 F.2d 404 (5th Cir. 1963), *cert. denied* 375 U.S. 986 (1964). In the fifteen years since *Mann* came into being it has been revisited many times in a number of Circuits and such visits have created considerable confusion and a conflict in the Circuits. The instant case is the first time that the Third Circuit has directly addressed itself to the *Mann* problem and its solution of the problem is what has prompted us to seek review in this Court.

In *Mann, supra.,* the court gave the identical instruction on intent as was given in this case. In spite of a lack of objection to the instruction, the Fifth Circuit held it to be plain error and reversed, stating:

> "If the charge had ended when the jury was told that a person is presumed to intend the consequences of his own acts, when considered in the light of the charge as a whole, there would have been no error. When the words, "So unless the contrary appears from the evidence" were introduced, the burden of proof was thereupon shifted from the prosecution to the defendant to prove lack of intent. If an inference from a fact or set of facts must be overcome with opposing evidence, the inference becomes a presumption and places a burden on the accused to overcome that presumption. Such a burden is especially harmful when a person is required to overcome a presumption as to anything subjective, such as intent or wilfulness, and a barrier almost impossible to hurdle results." 319 F.2d 404 at 409.

In the instant case the matter of petitioners intent was purely subjective and the jury was permitted to infer evil intent from the use of the mails alone.

The advent of the Mann decision has given rise to a plethora of appellant problems. A detailed analysis of the recurring appearances of the *Mann* problem in the Fifth Circuit is to be found in the recent case of *United States v. Chiantese,* 560 F.2d 1244 (5th Cir. 1977). *Chiantese, supra.,* discloses that *Mann* over the years has caused the Fifth Circuit more than a modicum of judicial labor and frustration. Since the decision came down in 1963 the original teaching of Mann has been distinguished as often as it has been followed by the Fifth Circuit. *In United*

States v. Helms, 340 F.2d 15 (5th Cir. 1964), it was held that where there was objective evidence of intent, the 1963 holding Mann did not obtain. In this case there was no objective evidence of intent. In 1971 the Fifth Circuit held that where curative instructions were given immediately after the *Mann* instruction, the harm indigenous to *Mann* was vitiated. *United States v. Jenkins,* 442 F.2d 429 (5th Cir. 1971). Finally, in 1977 the Fifth Circuit attempted to put *Mann* in what it thought to be proper perspective. In *Chiantese, supra.,* the Fifth Circuit ruled prospectively *en banc,* that the Mann charge was no longer to be given and that curative instructions would not be considered in determining whether its use was reversible error.

In this case the Third Circuit while recognizing the vice of the *Mann* instruction found that the vice was cured by the virtue of the charge as a whole and then goes on to rule that the use of such instructions ninety days hence will be considered reversible error. While this holding may be considered a just solution by the Third Circuit, it can hardly be embraced with much enthusiasm by the petitioners who have been left in the unfortunate posture of legal pioneers on their way to the penitentiary. Since the weight of authority finds this type of instruction offensive it would have been far more equitable to call a spade a spade and treat reversible error as reversible error whenever it appeared.

The *Mann* instruction and similar instructions have been weighed and found wanting in the Second Circuit in *United States v. Barash,* 365 F.2d 395 (2d Cir. 1966) and have been criticized in the Eighth and Tenth Circuits. *United States v. Diggs,* 527 F.2d 509 (8th Cir. 1975); *United States v. Woodring,* 464 F.2d 1248 (10th Cir. 1972). On the other hand a *Mann* type instruction has been approved by the Ninth Circuit in *Sherwin v. United States,* 320 F.2d 137 (9th Cir. 1963) and found harmless by the Fourth Circuit in *United States v. Wilkins,* 385 F.2d 465 (4th Cir. 1967). Thus it can be seen that there is a conflict in the Circuits which can be resolved only by a grant of certiorari to this Court. That the question is important enough to warrant review can be judged from the amount of appellant litigation the use of the instruction has engendered. Mann has returned to the Fifth Circuit a minimum of seventeen times in the last fifteen years and has been the subject of appellant consideration in six other Circuits. The instruction has resulted in the reversal of numerous convictions and the puzzling affirmance of a number of others. It is important to the petitioners because they stand convicted on a charge that has been judicially labelled poison in the future but harmless in the past.

CONCLUSION

It is our contention that any shift of the burden of proof of intent from the government to the defendant is reversible error of a Constitutional dimension. At present the Mann instruction is proper in the Ninth Circuit and probably proper in the Fourth. It is improper in the Second Circuit and questionable in the Eighth and Tenth Circuits. It is now error in the Fifth Circuit but not per se reversible. In a few months it will constitute reversible error in the Third Circuit. The status of the instruction in the remaining Circuits is unresolved. It is submitted that this conflict and confusion in the Circuits calls for a final solution and that solution can only be supplied by a grant of review in this case.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 77-1780/1/2

UNITED STATES OF AMERICA,
Appellee,

v.

ARTHUR GARRETT, ANGELO MORINI,
FIESTA FOODS, INC.,
Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
D.C. Crim Nos. 77-18-1, 77-18-2, 77-18-3

Argued January 13, 1978
Before ALDISERT and HUNTER, *Circuit Judges* and CAHN,* *District Judge*

Blair A. Griffith
Alexander H. Lindsay
Bruce A. Antkowiak

Attorneys for Appellee

David O'Hanesian

Attorney for Appellants

OPINION
(Filed March 28, 1978)

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*Honorable Edward N. Cahn, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Appendix A.

HUNTER, *Circuit Judge:*

In this case, appellants challenge the trial judge's jury instruction on intent in their joint trial for mail fraud, 18 U.S.C. §1341 (1970). They contend that part of the charge impermissibly shifted the burden of proof on intent from the government to the defendants. Our review of the trial judge's charge convinces us that no reversible error was committed. We affirm.

I.

The facts will be outlined only briefly. The defendants are Arthur Garrett, food service director at Slippery Rock State College; Fiesta Foods, Inc., a food supply company; and Angelo Morini, the president of Fiesta Foods. They were charged with using the mails in furtherance of a scheme to falsify bids to the college in order to ensure that Fiesta would be awarded supply contracts for part of Slippery Rock's food service.

At trial, the government introduced evidence that Garrett had obtained a financial interest in Fiesta Foods. The college's purchasing agent testified that purchases of perishable foods were to be made after competing bids were solicited, if the product sought was available from more than one source. The evidence indicated that Garrett had instructed food services employees to solicit the required multiple bids for pizzas from defendant Morini, with the result that Fiesta Foods was awarded the pizza contracts. Representatives of other food companies, which had been listed on college purchase orders as participating in the bidding, testified that the bids made on behalf of their companies for the pizza contract were not authorized.

Appendix A.

Evidence of the use of the mails for submitting contracts and receiving payments for supplies was introduced by the government and not disputed by defendants. In its closing, the government contended that the evidence presented demonstrated that defendants engaged in a scheme to defraud the college and used the mails to perpetrate the scheme. The jury found each defendant guilty of eight counts of mail fraud.

II.

The defendants' contentions in this appeal are directed solely at the following portion of the trial judge's charge to the jury:

> As a general rule it is reasonable to infer that a person intends all the natural and probable consequences of an act knowingly done or knowingly omitted. So unless the evidence of a case leads you to a contrary conclusion you may draw the inference and find that the accused intended all the natural and probable consequences which one standing in like circumstances and possessing like knowledge should reasonably have been expected to result from an act knowingly done or knowingly omitted by the accused.

Counsel for defendants objected to this portion of the charge but were overruled by the trial judge.

The thrust of defendants' argument is that by instructing the members of the jury that they may infer the specific intent to defraud element of the crime of mail fraud from acts by the accused "unless the evidence leads [the jury] to a contrary conclusion," the trial judge shifted the burden onto defendants to introduce evidence of their lack of intent to defraud. Further,

defendants argue that the instruction is inconsistent with other elements of the charge placing the burden of proving all elements of the crime on the government.

The Fifth Circuit has reviewed the instruction under consideration here numerous times over the last fifteen years. In *Mann v. United States,* 319 F.2d 404 (5th Cir. 1963) *cert. denied* 375 U.S. 986 (1964), the court held that the trial judge's use of the instruction in a prosecution for wilful evasion of income tax payments constituted plain error. In *Mann,* the court stated:

> When the words "So unless the contrary appears from the evidence" were introduced [after the first sentence of the instruction], the burden of proof was thereupon shifted from the prosecution to the defendant to prove lack of intent. If an inference from a fact or set of facts must be overcome with opposing evidence, then the inference becomes a presumption, and places a burden on the accused to overcome that presumption. Such a burden is especially harmful when a person is required to overcome a presumption as to anything subjective, such as intent or wilfulness, and a barrier almost impossible to hurdle results.

319 F.2d at 409. *See also United States v. Schilleci,* 545 F.2d 519 (5th Cir. 1977); *United States v. Driscoll,* 454 F.2d 792 (5th Cir. 1972); *Henderson v. United States,* 425 F.2d 134 (5th Cir. 1970); *South v. United States,* 412 F.2d 697 (5th Cir. 1969).

Although *Mann* seemed to indicate that use of the charge in subsequent criminal cases would constitute reversible error *per se,* later Fifth Circuit cases recognized factual situations in which a conviction would not be reversed even though the *"Mann* instruction" was given. First, in *United States v. Helms,* 340 F.2d 15 (5th Cir. 1964), *cert. denied* 382 U.S. 814 (1965), another tax evasion case, the court refused to reverse a conviction after a jury trial in which the *Mann* instruction was given. In that case, the government introduced two sets of records, one of which was false and from which defendant's tax returns were prepared. The appeals court noted that the jury's determination of whether the defendant had prepared the two sets of books—a matter of objective conduct—was dispositive of his criminal intent. The *Mann* decision was distinguished on the ground that the jury in that case, in which intent could not be determined from objective conduct alone, could have been misled far more easily by the offensive language in the charge. *See also United States v. Durham,* 512 F.2d 1281 (5th Cir.) *cert. denied* 423 U.S. 871 (1975).

Another factual situation in which use of the *Mann* charge was determined not to constitute reversible error is found in *United States v. Jenkins,* 442 F.2d 429 (5th Cir. 1971). Although the same language was used in *Jenkins* as in *Mann,* the court found that curative instructions immediately following the *Mann* language vitiated any harmful effect that the challenged instruction might have on the jury.[1] *See also United States v.*

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1. The saving elements of the charge included directives 1) that the jury was entitled to consider any statements made and acts done or omitted by the accused, and all facts and circumstances in evidence which may aid in determination of state of mind; and 2) that the law never imposes on a defendant in a criminal case the burden of calling witnesses or producing evidence. United States v. Jenkins, 442 F.2d 429, 438 (5th Cir. 1971).

Roberts, 546 F.2d 596 (5th Cir.), *cert. denied* 431 U.S. 968 (1977); *United States v. Duke,* 527 F.2d 386 (5th Cir.), *cert. denied* 426 U.S. 952 (1976); *United States v. DeSimone,* 452 F.2d 554 (5th Cir. 1971), *cert. denied* 406 U.S. 959 (1972).

In *United States v. Chiantese,* 560 F.2d 244 (5th Cir. 1977), the Fifth Circuit attempted to rid itself of the recurrent appeals arising from use of the charge. Although the court refrained from mandating a rule of *per se* reversal whenever the *Mann* charge is given, the court *en banc* held prospectively that curative instructions will not be considered in determining whether a trial judge's use of the *Mann* charge is reversible.

Other circuits have criticized the language of the instruction.[2] This circuit, however, has not had occasion to pass on the challenged instruction until now. In *United States v. Restaino,* 405 F.2d 628 (3d Cir. 1968), the district court had instructed the jury on intent in language similar to that used in this case. Defense counsel timely objected to the instruction, and the district judge corrected and supplemented the charge on intent. Thus, on appeal, this court did not review the instruction.

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2. *See, e.g.,* United States v. Robinson, 545 F.2d 301 (2d Cir. 1976); United States v. Diggs, 517 F.2d (8th Cir. 1975); United States v. Robinson, 464 F.2d 1248 (10th Cir. 1972); United States v. Wilkens, 385 F.2d 465 (4th Cir. 1967); Cohen v. United States, 378 F.2d 751 (9th Cir. 1967); United States v. Releford, 352 F.2d 36 (6th Cir. 1965).

III.

An appellant court's role in reviewing jury instructions is to examine the entire charge in order to determine whether the district judge properly performed his function. *See Cupp v. Naughten,* 414 U.S. 141 (1973). The district judge is responsible for giving the jury the guidance by which it can make appropriate conclusions from the testimony. This duty is performed by clearly stating the relevant legal criteria. *Bollenbach v. United States,* 326 U.S. 607 (1946).

We thus must determine, in light of the entire jury charge, whether the trial judge's use of the *Mann* instruction misled the jury by effectively imposing on defendants the burden of proving lack of intent to defraud.

As to the first sentence of the challenged instruction—"As a general rule it is reasonable to infer that a person intends all the natural and probable consequences of an act knowingly done or knowingly omitted"—defendants do not contend and we do not hold that this portion is in any way improper. Rather, defendants point to the second sentence of the charge— ". . . unless the evidence of a case leads you to a contrary conclusion, you may draw . . . [the inference outlined in the first sentence]" as containing what they assert to be the impermissible, "burden-shifting instruction." Although it has been suggested that the instruction does not have the effect of shifting the burden of proof to the defendant,[3] it is possible that a jury might construe the second sentence of the instruction as an invitation to

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3. *See* United States v. Chiantese, 560 F.2d 1244, 1256 & 1259 (5th Cir. 1977) (Hill, J., concurring) (Ainsworth, J., dissenting).

resume the requisite intent in the absence of rebuttal evidence introduced by defendant. The instruction's prolixity serves only to confuse the jurors and adds little to their understanding of the legal criteria they must apply, "since insofar as the statement has logical validity the jury would know it anyhow." *United States v. Barash,* 365 F.2d 395 (2d Cir. 1966).

In this case, however, the instructions *as a whole* fully informed the jury of the government's burden of proof on the question of intent. The jury was instructed on the following:

1) the law presumes the defendants to be innocent of a crime;

2) the presumption of innocence alone is sufficient to acquit unless the jurors are satisfied beyond a reasonable doubt of a defendant's guilt;

3) the burden is always on the prosecutor to prove guilt beyond a reasonable doubt;

4) this burden never shifts to a defendant;

5) a defendant is never under a burden or duty of calling any witnesses or producing any evidence;

6) the burden is on the government to establish the guilt of a corporate defendant, just as in the case of an individual defendant;

7) the prosecution has the burden of proving beyond a reasonable doubt that the defendants knowingly did an act forbidden by law purposely intending to violate the law; and

8) that such intent may be determined from all the facts and circumstances surrounding the case.

We hold, in light of these instructions, that the trial judge properly informed the jury of the government's burden of proof on the issue of intent and that the potentially harmful effect of the *Mann* instruction was vitiated. Thus we find no reversible error in this case arising from the use of the *Mann* instruction.

IV.

Notwithstanding our holding in this case, the confusing nature of the instruction's language and the extent of judicial time spent reviewing charges containing the *Mann* instruction convinces us to prohibit its use in criminal trials commenced ninety days after the filing of this opinion.

Hereafter, district courts in this circuit shall not use language in instructions that reasonably can be interpreted as shifting the burden to the accused to produce proof of innocence. This includes charges indicating that the law *presumes* a person to intend the natural and probable consequences of his knowing acts, as well as charges substantially similiar to that given in this case.[4] Use of this instruction will be deemed error, and convictions obtained in trials in which the instruction is given will be reversed, except in those "very extraordinary circumstances [in which] the error may be found so inconsequential as to avoid the necessity of reversal on appeal." *United States v. Fioravanti,* 414 F.2d 407, 420 (3d Cir. 1969).

Certainly, the use of particular language in charging the jury is left to the sound discretion of the

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4. *See* United States v. Chiantese, 560 F.2d 1244 (5th Cir. 1977).

trial judge. *See United States v. Bailey,* 451 F.2d 181 (3d Cir. 1971); *Government of the Virgin Islands v. Rivera,* 439 F.2d 1126 (3d Cir. 1971). Further, a trial judge should tailor his instructions to a particular case and not rely too heavily on form instructions. *See United States v. Barber,* 442 F.2d 517 (3d Cir. 1971). Nevertheless, the charges outlined in Devitt & Blackmar, Federal Jury Practice and Instructions §14.13 (1977 ed.)[5] and in *United States v. Wilkinson,* 460 F.2d 725 (5th Cir. 1972),[6] may be of some help to trial judges in avoid-

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5. The instruction prepared by Devitt & Blackmar is as follows:

> Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statement made and done or omitted by the defendant, and all other facts and circumstances in evidence which indicate his state of mind.
>
> You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. As I have said, it is entirely up to you to decide what facts to find from the evidence.

1 Devitt & Blackmar, *Federal Jury Practice & Instructions* §14.13 (1977 ed.).

6. The *Wilkinson* court suggested the following language:

> It is reasonable to infer that a person ordinarily intends the natural and probable consequences of his knowing acts. The jury may draw the inference that the accused intended all of the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from an intentional act or conscious

ing the use of instructions on intent that might be construed by a jury to shift the burden of proof to the defendant in a criminal case.

We repeat and emphasize that this decision with respect to the *Mann* instruction shall have only prospective application in those jury trials which shall commence ninety days after this opinion is filed.

The judgments of conviction will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

> omission. Any such inference drawn is entitled to be considered by the jury in determining whether or not the government has proved beyond a reasonable doubt that the defendant possessed the required criminal intent.

United States v. Wilkinson, 460 F.2d 725, 733.

APPENDIX B

§1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

As amended May 24, 1949, c. 139 §34, 63 Stat. 94; Aug. 12, 1970, Pub. L. 91-375, §6(j) (11), 84 Stat. 778.